Ramona Equipment Rental

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The trial court granted defendants' motion for discovery sanctions pursuant to Code of Civil Procedure section 2023, subdivision (b), [1] and dismissed the complaint (hereafter the present action) filed by plaintiffs Ramona Equipment Rental, Inc. (RER) and James M. Piva Enterprises, Inc. (JMPE). The appeal by RER and JMPE (together plaintiffs) asserts the dismissal order was an abuse of discretion.

I. FACTUAL AND PROCEDURAL BACKGROUND

Because we evaluate the trial court's exercise of its discretion in the context of the facts and circumstances, we detail the litigation history between these parties, of which the present action is the latest chapter.

A. The Background

The Business and Family Entanglements

In 1990 defendant James M. Piva (Jim), the son of defendants Ronald and Barbara Piva (together the Pivas), was married to Tammara, the daughter of John and Carolyn Souza (the Souzas). Jim and Tammara became partners with the Souzas in RER, an equipment rental business in Ramona. The Souzas contributed capital and Jim operated RER's business. The parties contemplated that Jim and Tammara would purchase the Souzas' interest in RER after five years. In mid-1995 Jim and Tammara developed plans to open a second location in Poway; they planned to use the equipment from RER's Ramona location to service the customers from both Ramona and their new Poway location. Jim and Tammara incorporated JMPE in mid-1995 as the operating entity for the Poway location; they were the sole shareholders in JMPE, and planned to merge RER into JMPE after they purchased the Souzas' interest in RER.

However, in early 1996 marital problems between Jim and Tammara resulted in their separation, and Jim's subsequent attempts to acquire the Souzas' interest in RER were rebuffed. Divorce proceedings,

as well as a series of lawsuits, began to plague these parties in the spring of 1997.

The Prior Lawsuits

The Souzas' opening salvo was an April 1997 lawsuit in which the Souzas, represented by attorney Agnew, sought an injunction barring Jim from using RER's equipment for customers of JMPE's Poway location. At the same time, the Souzas, acting as board members of RER, terminated Jim's employment with RER. The net impact of this two-pronged attack was to eliminate Jim's source of income; Jim was forced to close JMPE in June 1997 and filed chapter 7 bankruptcy proceedings for himself and JMPE.

In September 1997 the Souzas filed an adversary proceeding in Jim's bankruptcy action objecting to discharge of debts he owed to them, and RER filed an identical adversary proceeding in Jim's bankruptcy action objecting to discharge of debts Jim allegedly owed to RER.

At a bankruptcy auction in December 1997, the Souzas purchased Jim's shares in RER. They also purchased his shares in JMPE and his interest in the realty that housed JMPE's Poway facility. In the spring of 1998 the Souzas (after first converting JMPE's chapter 7 case into a chapter 11 reorganization proceeding) caused RER and JMPE to file the next lawsuit. This lawsuit, filed by attorney Agnew, asserted claims in excess of $1,000,000 and named Jim, the Pivas, and the Pivas' company (defendant You Haul Concrete, Inc., hereafter YHC) as defendants. JMPE's participation in that lawsuit ended in the summer of 1998 when the bankruptcy court, over the Souzas' objection, converted the JMPE bankruptcy proceeding back into a chapter 7 proceeding. This action vested control of JMPE's claim in the chapter 7 Trustee, and the Trustee promptly abandoned the claim.

In October 1998 the Souzas, represented by attorney Agnew, filed another action naming Jim, the Pivas, and YHC as defendants; the action alleged YHC had breached a lease of the Poway realty acquired by the Souzas. The Souzas lost that lawsuit, and the judgment against the Souzas and in favor of all defendants was affirmed on appeal. (See Souza v. You Haul Concrete, Inc. (Oct. 10, 2002, D037771) [nonpub. opn.].)

In April 2000 the Souzas, represented by attorney Agnew, caused RER to file another action (Case No. GIE 001927) naming Jim's new wife Melanie as the defendant; RER's First Amended Complaint in that action substantially mirrored the allegations of the present action. In June 2000 the Souzas, represented by Agnew, caused RER to file another action (Case No. GIC 749213) naming Jim, Melanie, the Pivas, and YHC as defendants, [2] RER's First Amended Complaint in Case No. GIC 749213 also mirrored the allegations of the present action. The parties stipulated these two complaints should be consolidated (the consolidated matter). A Trial Readiness Conference (TRC) for the consolidated matter was set for March 23, 2001, and trial was set for April 13, 2001. However, on March 12, 2001, one month before the trial, plaintiffs dismissed the consolidated matter without prejudice.

B. The Present Action

The Resurrected Lawsuit and Settlement Efforts

The March 2001 dismissal of the consolidated matter provided defendants only a brief respite from the litigation, because in August 2001 defendants were served with the complaint in the present action. In this complaint the Souzas, RER and JMPE, represented by attorney Agnew, resurrected their claims against defendants that previously had been asserted in the dismissed consolidated matter. During the pendency of the present action, plaintiffs apparently took no steps to prepare for trial; they did not initiate discovery or designate expert witnesses. The parties did discuss settlement, participating first in a mediation on January 23, 2002, and thereafter engaging in informal discussions between counsel. These efforts did not produce a settlement and YHC and the Pivas (together, YHC) initiated discovery in the belief the dispute would be resolved only by a trial.

The Discovery and Responses

In mid-March 2002 the court set the trial call for June 28, 2002, set a TRC for May 31, 2002, and established May 24, 2002, as the discovery cut-off date. Testa, attorney for YHC, began discovery by serving form interrogatories (and thereafter serving special interrogatories) directed to the Souzas, and by sending a request to produce documents directed to the Souzas. Responses to this written discovery were all due in advance of April 30, 2002, the date noticed by YHC for the Souzas to be deposed.

The Souzas did not respond to any of the written discovery requests and Testa provided written notification that their responses were overdue, demanded that all materials be provided by May 1, 2002, and renoticed the date for the Souzas' depositions to May 20, 2002, to permit review of the written discovery in advance of their depositions. On May 15, 2002, after numerous telephone calls concerning the overdue discovery were ignored, and considering the pending May 24 cut-off date for discovery and motions, Testa moved ex parte for an order compelling compliance with the discovery and for sanctions. The court declined to order sanctions but did order the responses to the written discovery requests be served on Testa no later than May 21, and the depositions take place no later than May 29.

On May 15 Testa asked Agnew when the discovery responses could be expected and the depositions rescheduled; Agnew responded he would contact Testa the following day. However, no contact was forthcoming, and on May 20 Testa again called Agnew to find out when the documents would be provided and to obtain a date for the Souzas' depositions. On May 24, after the discovery and motion cut-off date and three days after the court-ordered date for responses to the written discovery requests, Agnew contacted Testa and stated his clients would not be available for depositions until June 5 and he was still working on the discovery responses that should be ready by the following week.

On May 29 (two days before the scheduled TRC), Agnew faxed a letter to Testa stating the written answers to the interrogatories, and sworn response to the document request, would be provided at the May 31, 2002 TRC. Agnew stated there were approximately 40 boxes of documents that responded to the document request, he was nearly finished reviewing the documents, and the documents would be available for inspection on June 3, 2002. Agnew also stated Mr. Souza would be available for deposition on June 5 but did not mention Mrs. Souza's availability for deposition. Testa's response, faxed to Agnew on May 29, pointed out that failure to respond to the discovery requests made it impossible to prepare a meaningful "Trial Readiness Conference Report" for filing at the TRC, Agnew's clients had defaulted under the court-ordered deadlines, and Testa had scheduled an ex parte hearing to seek remedies for the noncompliance with the discovery orders.

Defendants did not receive responses to the interrogatories, or sworn responses to the document request at the TRC on May 31, 2002. Instead, Agnew revealed that the Souzas had on May 30, 2002, dismissed without prejudice any claims they held as individuals, and that the discovery, which had been directed only to the Souzas, was therefore moot.

The Terminating Sanctions

YHC moved for an order imposing sanctions based on the noncompliance with the court's discovery orders, and requested entry of evidentiary or terminating sanctions; Jim and Melanie filed a joinder in the motion. Plaintiffs opposed the motion, asserting (1) the dismissal by the Souzas made all discovery defaults by them moot and (2) the remaining plaintiffs (RER and JMPE) had not defaulted in any discovery obligations because no discovery had been directed at RER or JMPE.

The trial court's tentative ruling was to deny terminating sanctions but to grant evidentiary sanctions (1) precluding the Souzas from testifying and (2) precluding plaintiffs from introducing any documents not produced in compliance with the court's May 15 discovery order. However, at oral argument plaintiffs' counsel noted, and the trial court recognized, that precluding the documentary and testimonial evidence would constitute a de facto terminating sanction. After oral argument, the court modified its tentative ruling and granted defendants' motion for terminating sanctions. [3] This appeal followed.

II. ANALYSIS

A. Applicable Standards

We review the court's imposition of discovery sanctions for abuse of discretion. " ' "The power to impose discovery sanctions is a broad discretion subject to reversal only for arbitrary, capricious, or whimsical action. [Citations.] Only two facts are absolutely prerequisite to imposition of the sanction: (1) there must be a failure to comply . . . and (2) the failure must be wilful [citation]." [Citation.]' " (Vallbona v. Springer (1996) 43 Cal.App.4th 1525, 1545.) The question before us is not

whether the trial court should have imposed a lesser sanction, but whether the court abused its discretion by imposing the sanction it did. (Collisson & Kaplan v. Hartunian (1994) 21 Cal.App.4th 1611, 1620; Lang v. Hochman (2000) 77 Cal.App.4th 1225, 1245.)

Code of Civil Procedure section 2023 provides that dismissal may be used as a sanction for abuse of the discovery process. (§ 2023, subd. (b)(4).) It provides in part: "Misuses of the discovery process include, but are not limited to, the following: [¶] . . . [¶] (4) Failing to respond or to submit to an authorized method of discovery. [¶] . . . [¶] (7) Disobeying a court order to provide discovery." (§ 2023, subd. (a).) Accordingly, terminating sanctions may be issued for failure to obey an order compelling answers to interrogatories (§ 2030, subd. (k)), compelling responses to a request to produce documents (§ 2031, subd. (l)), or compelling appearance at a deposition (§ 2025, subd. (j)(3)).

B. The Willfulness Issue

Plaintiffs contend the court's order of terminating sanctions is per se reversible because the order contains no express finding that the failure to comply with the discovery order was willful. Former section 2034 (repealed by Stats. 1986, ch. 1334, § 1, effective July 1, 1987), which had governed discovery sanctions, explicitly required that a party's failure to comply with discovery requests be willful before the court could strike pleadings, enter a default, or enter a dismissal, and some courts interpreted former section 2034, subdivision (d) to require that a court make an express finding of willfulness before it imposed terminating sanctions. (Midwife v. Bernal (1988) 203 Cal.App.3d 57, 62-63; Deyo v. Kilbourne (1978) 84 Cal.App.3d 771, 787.) However, section 2023, which now governs discovery sanctions, contains no requirement of willfulness. (§ 2023; Newland v. Superior Court (1995) 40 Cal.App.4th 608, 615.) Courts no longer require a finding of willfulness to justify the imposition of sanctions under section 2023, subdivision (b) (Ghanooni v. Super Shuttle (1993) 20 Cal.App.4th 256, 260; Kohan v. Cohan (1991) 229 Cal.App.3d 967, 971), although willfulness is still a factor to be considered when considering whether to order terminating sanctions. [4] (Vallbona v. Springer, supra, 43 Cal.App.4th 1525.)

The trial court did not explicitly state that plaintiffs' noncompliance with the discovery orders was willful but did find the Souzas refused to timely comply with discovery orders. This implicit finding of willfulness satisfies any requirement imposed under section 2023 (Sauer v. Superior Court (1987) 195 Cal.App.3d 213, 227-228 [" 'A willful failure does not necessarily include a wrongful intention to disobey discovery rules. A conscious or intentional failure to act, as distinguished from accidental or involuntary noncompliance, is sufficient to invoke a penalty.' "]), and the trial court's finding that a party acted willfully is entitled to substantial deference on appeal. (Ibid.) Plaintiffs did not assert below that their noncompliance with their discovery obligations was inadvertent, but instead asserted that any obligation they may have had evaporated when the Souzas voluntarily withdrew as parties to the complaint. We conclude the record supports the trial court's implicit determination the discovery defaults were willful.

In a related contention, plaintiffs argue that Agnew, not the Souzas or plaintiffs, bore sole responsibility for noncompliance with the discovery orders, and therefore no sanctions should have been levied against plaintiffs because they did not willfully avoid discovery. However, plaintiffs below appeared to concede the Souzas were the defaulting parties, and argued only that plaintiffs should not be sanctioned for the conduct of the Souzas. [5] Additionally, plaintiffs filed no declaration from Agnew, either in connection with the sanctions motion or by motion for relief under section 473 (see R.S. Creative, Inc. v. Creative Cotton, Ltd., supra, 75 Cal.App.4th at p. 497), suggesting that he alone was responsible for the defaults. Because this claim is contrary to the arguments raised below, we decline plaintiffs' invitation to consider it for the first time on appeal.

C. The Alter Ego Issue

Plaintiffs next assert that dismissal of the plaintiffs' claims, based on the defaults of the Souzas, provided an improper windfall to YHC. Plaintiffs rely on the maxim that sanctions for discovery defaults should not give a party more than would have been obtained if the discovery had been answered and cannot operate to preclude the defaulting party from a trial on the merits of claims unconnected to the default. (Caryl Richards, Inc. v. Superior Court (1961) 188 Cal.App.2d 300, 303-305; Wilson v. Jefferson (1985) 163 Cal.App.3d 952, 959.) Plaintiffs argue that because YHC's discovery sought information, documents and deposition testimony from the Souzas in their individual rather than their corporate capacity, the absence of that information necessarily did not prejudice YHC's ability to defend itself against the claims asserted by plaintiffs against YHC. [6]

However, there is evidentiary support for the conclusion that plaintiffs were the alter egos of the Souzas for purposes of discovery. Accordingly, the court could have concluded that documents sought from the Souzas, and YHC's ability to depose the Souzas to obtain information on a broad range of relevant subjects, would have generated information illuminating the claims asserted by plaintiffs against YHC. We conclude that when a corporation's controlling person thwarts discovery targeted at the claims asserted by the corporate entity, and this prejudices the opposing party's ability to defend against those claims, the trial court has the authority to impose terminating sanctions against the corporate entity based on the conduct of its controlling persons. (R.S. Creative, Inc. v. Creative Cotton, Ltd., supra, 75 Cal.App.4th at p. 496; [7] cf. § 2025, subd (j) [if party or party-affiliated deponent violates court order to attend deposition, court may enter terminating sanctions "against the party with whom the deponent is affiliated"].)

D. The Party Issue

Plaintiffs argue that, even if YHC could obtain sanctions against plaintiffs for the Souzas' defaults, it was error to order dismissal of plaintiffs' claims against Jim and Melanie because the discovery was propounded by YHC, not by Jim and Melanie. Plaintiffs argue there is no authority permitting a nonpropounding party to obtain the benefits of a sanction imposed for noncompliance with a coparty's discovery requests. However, the courts have recognized that, under some circumstances, a

nonpropounding party may "piggy-back" on his or her coparty's motion seeking terminating sanctions for an opposing party's failure to respond to the coparty's motion. (Calvert Fire Ins. Co. v. Cropper (1983) 141 Cal.App.3d 901, 905; accord, Trail v. Cornwell (1984) 161 Cal.App.3d 477, 483, fn. 4.)

Plaintiffs argue this rule applies only to cases in which the nonpropounding coparty's interest is identical to the propounding party's interest, and in this case the documents sought by YHC were limited to the few causes of action asserted against them, while the causes of action asserted against Jim and Melanie were based on time frames, acts and injuries distinct from the matters covered by YHC's discovery. Plaintiffs provide no citation to the record suggesting this argument was raised below. Because this contention involves peculiarly factual questions, including the extent to which documents responsive to YHC's request would have been duplicative of documents relevant to plaintiffs' claims against Jim and Melanie not developed below, we deem this contention waived. (In re Marriage of Freeman (1996) 45 Cal.App.4th 1437, 1450-1451.) Additionally, to the extent Jim and Melanie were deprived of the opportunity to depose the Souzas on matters peculiar to the allegedly distinct claims against them (§ 2025, subd. (j)(1)), they were directly prejudiced by plaintiffs' failure to comply with the discovery orders.

E. The Proportionality Issue

Plaintiffs argue the terminating sanction imposed was an abuse of discretion because it was disproportionate to the offending conduct. They assert Agnew did make available the documents for inspection, did make John Souza for deposition, and was only a few days late in proffering this discovery. Plaintiffs contend terminating sanctions are reserved for persistent and flagrant refusals to comply with discovery, and therefore the terminating order was an abuse of discretion; plaintiffs' responses were merely tardy and less drastic sanctions were available under the circumstances.

In essence, plaintiffs claim the court erred by not imposing lesser sanctions. However, the question is not whether the trial court should have imposed lesser sanctions, but whether the court abused its discretion by imposing the sanction it did. (Collisson & Kaplan v. Hartunian, supra, 21 Cal.App.4th at p. 1620 [approving order granting terminating sanctions]; Lang v. Hochman, supra, 77 Cal.App.4th at p. 1245.) Although plaintiffs attempt to minimize their discovery abuses by characterizing their sole default as providing responses merely days after they were due, the trial court could well have concluded, based on all of the circumstances, that plaintiffs' numerous defaults made " '[o]btaining discovery from [plaintiffs] . . . like pulling teeth.' " (Collisson & Kaplan v. Hartunian, supra, 21 Cal.App.4th at p. 1616.) Plaintiffs provided no answers to either the form interrogatories or the special interrogatories notwithstanding three different deadlines (the statutory mid-April 2002 date; the court ordered May 21, 2002 date; and plaintiffs' promise to provide answers at the May 31, 2002 TRC), and plaintiffs never offered to provide answers to that discovery even in the face of the pending sanctions motion. Similarly, plaintiffs provided no written response to the request to identify and produce documents before the statutory mid-April 2002 date, or by the court ordered May 21, 2002 date, or at the May 31, 2002 TRC; instead, two days before the TRC, plaintiffs merely

informed defendants that they would be afforded an opportunity to sift through 40 boxes of documents during the following week. Finally, although the depositions of John and Carolyn had been scheduled for April 30, the absence of responses to the written discovery required those dates to be vacated, and the court order provided a May 29, 2002 deadline to complete the rescheduled depositions. Those dates were again vacated because the written discovery and document production had not been forthcoming. Although plaintiffs offered to make John Souza available for deposition on June 5, 2002, they never offered a date for Carolyn Souza's deposition. Moreover, in the context of plaintiffs' failure to provide any interrogatory answers, and the offer to provide 40 boxes of documents two days before John's proposed deposition, the trial court could have concluded the 11th hour offer to make John Souza available for a June 5, 2002 deposition was a hollow offer. We are not persuaded by plaintiffs' attempt to characterize their history of persistent defaults and foot-dragging as one in which they were merely a few days late in complying with their discovery obligations.

Plaintiffs also argue that terminating sanctions were an abuse of discretion because less drastic sanctions and remedies were available that would have cured any harm from plaintiffs' defaults. Although issue or evidence sanctions were theoretically available (§ 2023, subd. (b)(2) & (b)(3); Deyo v. Kilbourne, supra, 84 Cal.App.3d at p. 792 [where a party refuses to supply information relevant to a particular claim, an order precluding that claim is an appropriate sanction]), the breadth of the information sought by defendants but withheld by plaintiffs would have made evidence or issue preclusion sanctions the functional equivalent of terminating sanctions; precluding plaintiffs from testifying (because they avoided being deposed), from introducing any documents (because none were produced), and from using any witnesses (because none were disclosed in their interrogatory answers) would have left plaintiffs with no evidentiary presentation. Indeed, both parties acknowledged in the trial court that the trial court's tentative ruling--to impose evidence or issue preclusion sanctions--was a de facto grant of terminating sanctions.

Plaintiffs' "less drastic sanctions" argument asserts the court should instead have merely ordered a brief continuance of the TRC and trial to permit defendants to obtain the discovery. However, several trial dates had already been set and thereafter vacated without plaintiffs complying with their discovery obligations, permitting the trial court to infer that imposing only monetary sanctions while granting plaintiffs another continuance would not obtain compliance. [8] Moreover, plaintiffs' argument overlooks that, although sanctions for discovery abuse are certainly intended to vindicate the interest of the litigant who is denied access to information (Caryl Richards, Inc. v. Superior Court, supra, 188 Cal.App.2d at p. 305), there are other interests vindicated by terminating sanctions, including the interest of the court in compelling compliance with its process (Morgan v. Southern Cal. Rapid Transit Dist. (1987) 192 Cal.App.3d 976, disapproved on other grounds by Schwab v. Rondel Homes, Inc. (1991) 53 Cal.3d 428, 433-434), and the interest of other litigants to have timely access to the courts unimpeded by the unnecessary call upon judicial resources resulting from discovery abuse in the case in which the sanction is imposed. (Sauer v. Superior Court, supra, 195 Cal.App.3d at p. 230.) The remedy suggested by plaintiffs would have permitted plaintiffs to benefit from their delay by reducing the time defendants had to prepare for trial (ibid.), while leaving

unvindicated the interests of the court and of other litigants. The trial court did not abuse its discretion by refusing "to reward the type of brinkmanship displayed by [plaintiffs] here." (Ibid.)

DISPOSITION

The judgment is affirmed. Defendants are entitled to costs on appeal.

WE CONCUR:

McINTYRE, J.

O'ROURKE, J.

1. All statutory references are to the Code of Civil Procedure unless otherwise specified.

2. Although we will collectively refer to Jim, Melanie, the Pivas and YHC as defendants, the issues raised by plaintiffs require us on occasion to distinguish among them.

3. The court also ordered that Agnew pay attorney fees to counsel for Piva and YHC representing the amount of the attorney fees incurred to prosecute the motions for sanctions.

4. Plaintiffs cite a string of cases decided after the statutory deletion of the willfulness requirement that purport to hold an express finding of willfulness remains a requirement for terminating sanctions. Although each of the cited cases concluded there was an evidentiary basis upon which the trial court could have found willfulness, none of the cases held that an express finding of willfulness was mandatory or that the absence of an express finding was reversible error. (See Juarez v. Boy Scouts of America, Inc. (2000) 81 Cal.App.4th 377, 388- 390 [evidence supported finding of abuse of discovery and justified sanctions selected by trial court]; Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns (1992) 7 Cal.App.4th 27, 36 [same]; R.S. Creative, Inc. v. Creative Cotton, Ltd. (1999) 75 Cal.App.4th 486, 496 [same]; Vallbona v. Springer, supra, 43 Cal.App.4th at p. 1545 [evidence supported finding of willful failure to comply with discovery].) Although evidence of willfulness remains a relevant consideration, no case holds an express finding of willfulness is required under the controlling statutory scheme.

5. In their written opposition to the sanctions motion, plaintiffs stated "Upon plaintiffs' [Souzas'] failure to answer interrogatories or produce documents, an order was entered that they do so. They did not comply with this order." (Italics added.) They also argued that the statute made "clear that it is the person or party who misuses discovery that is subject to discovery sanctions thereunder. Those parties were [the Souzas]."

6. Plaintiffs also argue there was a windfall because, as a technical matter, YHC's discovery requests required no responses at all. This assertion is based on the fact that, although the Souzas were nominally plaintiffs, the complaint itself showed that each separate cause of action was asserted by either RER or JMPE, and therefore YHC's discovery requests were improper ab initio because the Souzas were never actually plaintiffs from whom discovery could have been

compelled. However, the Souzas interposed no objections to the interrogatories, document requests or deposition notices on this (or any other) ground, and instead stipulated to dates for providing answers, documents and depositions. Under these circumstances, the claim that YHC's interrogatories and document requests were objectionable as directed to a nonparty is waived. (§ 2030, subd. (k); § 2031, subd. (l).) Additionally, the statute contemplates that a party may specify which officer or director of a corporate party it wishes to depose by noticing his or her deposition (§ 2025, subds. (d)(3) & (h)(1); Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2003) ¶ 8:469, p. 8E- 18), and therefore the notices designating the Souzas for deposition would not have been objectionable even had plaintiffs timely raised an objection.

7. Plaintiffs argue R.S. Creative, Inc. v. Creative Cotton, Ltd. does not support the dismissal order here because the conduct in that case- -the controlling person, Sebastian, forged evidence and destroyed other evidence- - was more egregious than that involved here. (R.S. Creative, Inc. v. Creative Cotton, Ltd., supra, 75 Cal.App.4th at pp. 496- 497.) Although the R.S. Creative court recognized the termination sanction was based, at least in part, on the forgery and alleged destruction of evidence, it did not hold these acts were prerequisites to terminating sanctions, but only that it was not an abuse of discretion to base its order, in part, on these acts. (Ibid.) Instead, the R.S. Creative court stated, "The record amply supports the trial court's exercise of its discretion in dismissing the complaint as a sanction for the repeated efforts of the plaintiffs to thwart discovery, including the violation of two discovery orders. [Sebastian] was the only principal of RSC. At all times relevant to this appeal she acted on its behalf as well as her own. Under these circumstances, we find no merit in the argument made in the trial court that defendants were not entitled to [depose Sebastian]. We reject the argument that [Sebastian] could further delay the deposition by the expediency of filing a new complaint removing herself as an individual party plaintiff. It is plain that she acted for RSC; indeed, the evidence indicates that she and RSC were one and the same. For the same reason, there is no merit in RSC's related argument that the dismissal was improper because it was based on conduct of [Sebastian] rather than RSC." (Ibid., italics added.)

8. In the current case, trial was continued to June 28, 2002, after mediation failed. When plaintiffs refused to provide answers, documents and depositions, defendants sought and obtained another continuance of the trial (to July 12, 2002), which was granted with an accompanying order that plaintiffs comply with discovery. Additionally, the court was aware that the substance of the current case had been the subject of an earlier case filed by plaintiffs against defendants where, one month before the scheduled trial date, plaintiffs had dismissed the action without prejudice.